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OFFICE OF PETITIONS

In re Patent No. 6,040,910 :
Issue Date: April 18, 2000 :
Application No. 09/294,528 : **DECISION ON PETITION**
Filed: April 19, 1999 :
Title: Athletic Training Glove :
:

This is a decision on the petition under 37 C.F.R. §1.378(b),
filed April 20, 2005.

The petition under 37 C.F.R. § 1.378(b) is **DISMISSED**.

Background

The above-identified patent issued on April 18, 2000. Accordingly, the first maintenance fee could have been timely paid during the period from April 18, 2003 through October 18, 2003, or with a late payment surcharge during the period from October 19, 2003 through April 18, 2004. No maintenance fee having been received, the patent expired on April 19, 2004.

With the instant petition, petitioner states that he was unable to timely pay the maintenance fee due to the restrictions of his Chapter 13 bankruptcy proceeding. Petitioner states that the case has just recently been decided and confirmed, and he is now free to make payments outside of his Chapter 13 status. In support, petitioner has included copies of his bankruptcy papers (Form B10), with a filing date of May 28, 2003, showing that he

owed \$30,516 in taxes to the IRS. Also included was a "Notice of Section 341(a) Meeting and Hearing on Confirmation of Chapter 13 Plan with Copy of Chapter 13 Plan", dated April 28, 2003, a "Motion Under Local Bankruptcy Rules 3015-1(n) and 9013-1(g) to Modify Plan or Suspend Plan Payments; Trustees Comments, Order Thereon", filed March 9, 2004, adding \$2000 in attorney's fees to the bankruptcy plan. Lastly, petitioner included a "Withdrawal of Trustee's Motion to Dismiss Chapter 13 Case", dated March 25, 2005.

Relevant Statutes and Regulations

35 U.S.C. § 41(c)(1) states that:

The Commissioner may accept the delayed payment of any maintenance fee required ... after the six month grace period if the delay is shown to the satisfaction of the Commissioner to have been unavoidable.

37 C.F.R. § 1.378(b) provides that:

Any petition to accept an unavoidably delayed payment of a maintenance fee must include:

- (1) The required maintenance fee set forth in §1.20(e) through (g);
- (2) The surcharge set forth in §1.20(i)(1); and
- (3) A showing that the delay was unavoidable since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent. The showing must enumerate the steps taken to ensure timely payment of the maintenance fee, the date and the manner in which patentee became aware of the expiration of the patent, and the steps taken to file the petition promptly.

§ 1.378(b)(3) is at issue in this case. Acceptance of a late maintenance fee under the unavoidable delay standard is considered under the same standard for reviving an abandoned application under 35 U.S.C. § 133. This is a very stringent standard. Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. In addition, decisions are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith, 671 F.2d at 538, 213 U.S.P.Q. at 982. Nonetheless, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable." Haines, 673 F. Supp. at 316-17, 5 U.S.P.Q.2d at 1131-32 (N.D. Ind. 1987).

Moreover, delay resulting from the lack of knowledge or improper application of the patent statutes, rules of practice or the Manual of Patent Examining Procedure, however, does not constitute "unavoidable" delay.

35 U.S.C. § 41(c)(1) does not require an affirmative finding that the delay was avoidable, but only an explanation as to why the petitioner has failed to carry his or her burden to establish that the delay was unavoidable. Cf. Commissariat A. L'Energie Atomique v. Watson, 274 F.2d 594, 597, 124 USPQ 126, 128 (D.C. Cir. 1960) (35 U.S.C. § 133 does not require the Commissioner to affirmatively find that the delay was avoidable, but only to explain why the applicant's petition was unavailing). Petitioner is reminded that it is the patentee's burden under the statutes and regulations to make a showing to the satisfaction of the Commissioner that the delay in payment of a maintenance fee is unavoidable. See Rydeen v. Quigg, 748 F. Supp. 900, 16 USPQ2d 1876 (D.D.C. 1990), aff'd 937 F.2d 623 (Fed. Cir. 1991), cert. denied, 502 U.S. 1075 (1992); Ray v. Lehman, 55 F. 3d 606, 608 - 609, 34 USPQ2d 1786, 1787 (Fed. Cir. 1995).

Analysis

Petitioner has not demonstrated unavoidable delay within the meaning of 35 U.S.C. §41(c)(1) and 37 C.F.R. § 1.378(b).

First, petitioner has not provided evidence showing at what date he was free to make payments outside of his Chapter 13 status. Secondly, petitioner has not explained whether or not he filed a motion with the Bankruptcy Court to allow him to pay the maintenance fee on his patent.

Conclusion

Petitioner has twenty-four months from the expiration of the patent in which to file a petition to accept the unintentionally delayed payment of the maintenance fee pursuant to 37 C.F.R. § 1.378(c). Such petition requires the \$1,640 surcharge set forth in § 1.20(i)(2). Petitioner may apply the \$700 surcharge paid with the instant petition towards the \$1,640 surcharge.

However, any request for reconsideration of this decision must be filed within **TWO MONTHS** of the mailing date of this decision. Any such petition for reconsideration must be accompanied by the \$400 petition fee set forth in § 1.17(f). After decision on the petition for reconsideration, no further reconsideration or review of the matter will be undertaken by the Commissioner. Accordingly, on request for reconsideration, it is extremely important that petitioner supply any and all relevant information and documentation in order to meet his burden of showing unavoidable delay. This includes statements by all persons with direct knowledge of the cause of the delay, setting forth the facts as they know them.

If on request for reconsideration, the delayed payment of the maintenance fee is not accepted, then the maintenance fee and the surcharge set forth in §1.20(i) are subject to refund following the decision on the petition for reconsideration, or after the expiration of the time for filing such a petition for

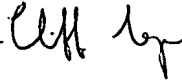
reconsideration, if none is filed. (Petitioner may request a refund of the maintenance fee and surcharge by writing to the Mail Stop 16, Director of the USPTO, P.O. Box 1450, Alexandria VA 22313-1450). A copy of the last decision rendered should accompany the request for refund).

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petitions
 Commissioner for Patents
 P.O. Box 1450
 Alexandria VA 22313-1450

By FAX: (703) 872-9306
 Attn: Office of Petitions

Telephone inquiries concerning this communication should be directed to the undersigned at 571-272-3207.



Cliff Congo
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